Vincent Tang Fook Lam v Sok Chun Tang (P)

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–02–165 OF 1999

ABDUL HAMID MOHAMAD, MOHD NOOR AHMAD AND ALAUDDIN JJCA

7 NOVEMBER 2003

Civil Procedure — Pleadings — Amendment of — Principles governing amendment of pleadings — Whether there was injustice caused to the other parties — Whether could be adequately compensated

Civil Procedure — Judgment — Grounds of judgment — Trial judge did not put down in writing his reasons — Whether he applied his mind at all to the circumstances

The respondent (one of the beneficiaries under a will) sued the appellant (executors and trustees and beneficiaries under the same will) for the return of a sum of RM2.9m with interest to the estate of the deceased (their mother), or a lesser sum to the respondent as her entitlement under the terms of the will. The claim was based on a promissory note for RM2.9m with interest of RM15,000 per month, signed by the appellant, which was found in the deceased's safe deposit box. The learned judge was of the view that the promissory note was a negotiable instrument. Hence, he held that consideration for the promissory note was presumed and it was for the appellant to prove that there was no consideration ever affected on the promissory note. To rebut the presumption, the appellant deposed that he never received the sum of RM2.9m as loan from the deceased, although there were occasional small loans given by the deceased to him previously, but of which he had settled in full. The learned judge was not convinced by the explanation and held that the appellant failed to rebut the presumption of consideration being given in the promissory note. The appellant appealed and the appeal was categorized under the following heads: (a) the re-amendment of the statement of claim at the close of the appellant's case; (b) the learned judge's findings went beyond the respondent's pleaded case; (c) the learned judge was plainly wrong to have ignored the evidence of the independent witness/DW2; (d) misappreciation of the evidence by the learned judge.

Held, dismissing the appeal:

(1) The law on amendment of pleadings is already well-settled. The provision relating to amendment of the writ and pleadings is governed by O 20 r 5 of the Rules of the High Court 1980 ('the RHC'). It is trite that amendments can be made at any stage of the proceedings including at the trial. The general principle is that the court will allow such amendments as will cause no injustice to the other parties. It is equally trite that if the application is allowed, the opposite party will normally be compensated by way of costs. Be that as it may, the Federal Court, had in the case of *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213 set out three basic questions for consideration and

it was for the plaintiff who asked the court to exercise a discretionary power in her favour to place some material and advance some cogent reasons to impel the court to lean on her side (see para 10).

(2) Although the learned judge did not deal at all in his judgment the question of re-amendment, this does not mean that he did not apply his mind at all to the circumstances raised by the learned counsel for the first defendant in his objection to the application for the re-amendment. The learned judge must have considered them, but only did not put them down in writing otherwise he would not have granted leave to re-amend. Hence, the exercise of his discretion could not be flawed by reasons of such omission (see para 10).

(3) All that the purported re-amendment sought to do was to throw a brighter light on the spectrum of the same facts relied on in the original statement of claim. In the court's view, all that the plaintiff was seeking to do was to frame her case so that the trial of the action would lead to a decision of the real matter in controversy. Therefore, the court was satisfied that the application for the re-amendment was bona fide. Also, for the same reasons, the court was satisfied that the amendment did not in effect turn the suit from one character into a suit of another and inconsistent character (see para 10).

(4) In respect of (b), it is trite law that the re-amendment allowed by the learned judge took effect not on the date in which the application was made or at the date of the order allowing the re-amendment, but at the commencement of the action, as if the re-amendment was made at the time the writ was issued (see para 11).

[Bahasa Malaysia summary

Responden (satu daripada benefisiari di bawah wasiat) telah mendakwa perayu (wasi dan pemegang amanah dan benefisiari di bawah wasiat yang sama) untuk pengembalian jumlah wang RM2.9j dengan faedah kepada estet si mati (emak mereka), ataupun jumlah yang kurang kepada responden sebagai hak beliau di bawah terma-terma wasiat itu. Tuntutan itu berdasarkan satu nota janji hutang untuk RM2.9j dengan faedah RM15,000 sebulan, yang ditandatangani oleh perayu, yang dijumpai di dalam peti deposit selamat si mati. Hakim yang arif berpendapat bahawa nota janji hutang itu adalah suratcara boleh niaga. Oleh itu, beliau memutuskan bahawa balasan untuk nota janji hutang telah dianggap dan adalah untuk perayu membuktikan bahawa tiada balasan ke atas nota janji hutang itu. Untuk mematahkan anggapan itu, perayu itu telah mendeposkan bahawa beliau tidak pernah menerima wang RM2.9j itu sebagai satu pinjaman daripada si mati, walaupun terdapat pinjaman-pinjaman kecil yang diberi kepadanya oleh si mati, tetapi yang telah dibayar kepada si mati. Hakim yang arif itu yakin dengan penerangan itu dan memutuskan bahawa perayu gagal mematahkan anggapan balasan telah diberikan di dalam nota janji hutang itu. Perayu merayu dan rayuan itu telah dikategorikan seperti berikut: (a) pindaan semula penyataan tuntutan pada akhir kes perayu; (b)keputusan hakim yang arif telah melebihi kes yang diplidkan responden;

(c) hakim yang arif telah khilaf sebab telah tidak mempertimbangkan keterangan saksi bebas/DW2; (d) keterangan yang tidak dipertimbangkan dengan betul oleh hakim yang arif.

Diputuskan, menolak rayuan:

(1) Undang-undang mengenai pindaan pliding telah ditetapkan. Peruntukan yang berkait dengan pindaan writ dan pliding ditakluk oleh A 20 k 5 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Ia adalah tetap bahawa pindaan boleh dibuat pada sebarang tahap prosiding termasuk perbicaraan. Prinsip am adalah bahawa mahkamah akan membenarkan pindaan-pindaan seperti itu yang tidak menyebabkan ketidakadilan kepada parti-parti lain. Ia juga adalah tetap bahawa jika permohonan itu dibenarkan, parti yang bertentangan akan dipampaskan dengan kos. Walau bagaimanapun, Mahkamah Persekutuan, telah didalam kes *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213 telah mengemukakan tiga persoalan untuk dipertimbangkan dan ia adalah untuk plaintif yang telah memohon kepada mahkamah untuk menggunakan kuasa budibicaranya memihaknya untuk meletakkan bahan dan mengemukakan alasan-alasan yang meyakinkan untuk mendorong mahkamah memihak kepadanya (lihat perenggan 10).

(2) Walaupun hakim yang arif tidak mempertimbangkan persoalan pindaan semula di dalam penghakimannya, ini tidak bermakna bahawa beliau tidak mempertimbangkan keadaan yang dibangkitkan oleh peguam defendan pertama di dalam bantahannya kepada permohonan untuk pindaan semula. Hakim yang arif mesti telah mempertimbangkannya tetapi tidak menuliskannya, sebab jika tidak, beliau mungkin tidak membenarkan pindaan semula. Oleh itu, penggunaan budibicaranya tidak dapat dicacatkan oleh perbuatannya itu (lihat perenggan 10).

(3) Apa yang cuba dilakukan oleh pindaan semula itu adalah untuk menerangkan fakta-fakta yang digunakan di dalam penyataan tuntutan yang asal. Pada pendapat mahkamah, plaintif hanya cuba menyediakan kes beliau supaya perbicaraan tindakan itu akan membawa kepada keputusan mengenai perkara yang dipertikaikan. Oleh itu mahkamah berpuas hati bahawa permohonan untuk pindaan semula adalah bona fide. Tambahan pula, untuk sebab yang sama, mahkamah berpuas hati bahawa pindaan tidak menukarkan guaman ini daripada satu ciri kepada guaman yang berciri lain atau tidak konsisten (lihat perenggan 10).

(4) Mengenai (b), ia adalah undang-undang tetap bahawa pindaan yang dibenarkan oleh hakim yang arif, telah berkuat kuasa bukan pada tarikh permohonan ini dibuat atau pada tarikh perintah yang membenarkan pindaan semula itu, tetapi pada permulaan tindakan itu, seakan-akan pindaan itu dibuat pada masa writ itu dikeluarkan (lihat perenggan 11).]

Notes

For cases on amendment of pleadings, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 4396-4423.

For cases on grounds of judgment, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3310–3312.

For amendment of pleadings, see 10 *Halsbury's Laws of Malaysia*, paras [10.3-192]–[10.3-198].

For judgments see 10 *Halsbury's Laws of Malaysia*, paras [10.9-001]–[10.9-023].

Cases referred to

Hock Hua Bank Bhd v Leong Yew Chin [1987] 1 MLJ 230 (refd)

Multi-Pak Singapore Pte Ltd (in receivership) v Intraco Ltd & Ors [1992] 2 SLR 793; [1993] 2 SLR 113 (refd)

Ong Guan Hua v Chong [1963] MLJ 6 (refd)

Raphael Pura v Insas Bhd & Anor [2001] 1 MLJ 49 (refd)

Sio Koon Lin & Anor v SB Mehra [1981] 1 MLJ 225 (refd)

Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors [1983] 1 MLJ 213 (folld)

Lim Chor Pee (Ong Ming Suan with him) (Chor Pee Anwarul & Co) for the plaintiff/respondent.

Dato' Cecil Abraham (G Rajasingam with him) (Shearn Delamore & Co) for the first defendant/appellant.

Appeal from: Civil Suit No S7-22-790 of 1989 (High Court, Kuala Lumpur)

Mohd Noor Ahmad JCA (delivering judgment of the court):

[1] This is an appeal by the first defendant against the decision of the learned judge who allowed the plaintiff's re-amended claim against him for the sum of RM580,000 with interest thereon at the rate of RM3,000 per month from 18 November 1983 to the date of full realization, being the plaintiff's entitlement under the will of Fung Yok Ying ('the deceased').

[2] To summarize the facts:

(1) The deceased died on 21 February 1987 leaving a will naming the defendants and one Elizabeth Tang Suk Yee ('Elizabeth') as the executors and executrix of her estate. The beneficiaries of her will were her five children (which included the executors and executrix) who were entitled to her estate in equal shares. The plaintiff is one of the beneficiaries. Probate was extracted on 6 February 1996. Elizabeth withdrew her consent to be an executrix, leaving the defendants to be the joint executors of the estate.

(2) On 6 July 1987 upon opening a safe deposit box maintained by the deceased with Chartered Bank, Benting Branch, Kuala Lumpur, amongst other valuables and personal effects of the deceased two promissory notes issued separately by each of the defendants were recovered. The sum stated in the promissory note issued by the first defendant is RM2.9m

and the sum stated in the promissory note issued by the second defendant is Australian $725,000. The second defendant initially denied owing the sum, but upon threats of legal proceedings by the plaintiff, he eventually settled the sum together with interest mentioned in the promissory note. However, the first defendant denied the existence of the loan mentioned in the promissory note ('PN'). Hence, the present action by the plaintiff.

(3) The PN dated 18 November 1983 was handwritten and signed by the first defendant, which reads:

> Dear Mummy,
>
> This is to confirm that I have borrowed from you through Yok Ying Realty Sdn Bhd, the sum of RM2,900,000 (two million and nine hundred thousand ringgit).
>
> Each month I shall be giving you the sum of RM15,000 for which I am not claiming tax deductions.
>
> The principal sum is repayable upon request by you.
>
> Signed..(first defendant)

(see at p 334 rekod rayuan jilid 2).

[3] Three issues were canvassed before the learned judge, viz (i) whether there was a loan of RM2.9m remaining unpaid?, (ii) even if the loan exists and remains unpaid, whether the appointment of the first defendant as an executor of the deceased's estate extinguished the debt? and (iii) whether the plaintiff's claim is statute-barred? The learned judge answered all the questions in favour of the plaintiff. However, in this appeal the first defendant only proceeded with issue (i).

(1) On issue (i), the learned judge was of the view that the PN was a negotiable instrument. Hence, based on the provision of s 30 of the Bills of Exchange Act 1949 and the authority in *Ong Guan Hua v Chong* [1963] MLJ 6, he held that consideration for the PN was presumed and it was for the first defendant to prove that there was no consideration ever affected on the PN. To rebut the presumption, the first defendant deposed that he never received the sum of RM2.9m as loan from the deceased, although there were occasional small loans given by the deceased to him previously, but of which he had settled in full. To fortify his denial he asserted that in none of the bank statements of the deceased, either here or in Hong Kong and those concerning the accounts of the deceased's personal company in the name of Yoke Ying & Realty Sdn Bhd ('Yok Ying'), show an amount equal to that of RM2.9m ever possessed by or disposed of by the deceased or Yok Ying during or around the time when the PN was given in order to show that no such loan was ever given by the deceased. He explained that the deceased inherited $^{1}/_{10}$ of the assets of her late father. Amongst the assets were shares in Fung Keong Rubber Manufactory (M) Sdn Bhd ('Fung Keong'). Some of the shares were registered in her personal name and others in Yok Ying. In April 1983, a sale and purchase agreement was signed with a public listed

company in Malaysia to acquire Fung Keong. The first defendant handled the deal for the vendors including the deceased. The sale was protracted. That caused the deceased great concern and this was aggravated by the failure of an earlier transaction where the shareholders of Fung Keong were supposed to sell their stake to Sime Darby Bhd. Around that time, the first defendant became the managing director of Concrete Industries KL Sdn Bhd ('Concrete Industries'). The company was founded by the deceased's late husband and its substantial holdings were inherited by the deceased which shares were registered under Yok Ying's name. The first defendant is an/or was also a shareholder of the company. He changed its name to CI Holdings Bhd ('CI Holdings'). As the result of bonds and rights issues Yok Ying's shareholdings in the company increased. The first defendant intended to float the CI Holdings in public. As such, he wrote two letters to the deceased sometime in 1981 and 1982 respectively. Briefly, the first letter speaks of the need to inject 20% more capital to the holdings in Yok Ying and TFL Holdings (the first defendant's nominated company) amounting to RM301,658. The deceased was asked to put in RM70,000 and the remainder would be raised by the first defendant. To alleviate her worry about money to spend he undertook to give her RM2,540 every month from January 1981. And to brighten her up he referred to the dividend at 9% to be paid out by Concrete Industries to Yok Ying amounting to about RM40,000 and to the dividend of about 6% to be paid out by Yok Ying amounting to about RM50,000. The second letter reflects that the deceased was always scared of doing business and that she wanted to repay the RM1m loan taken from Auntie Lucia when he asked for it for a maximum of two years. He assured her that though the interest on the loan might be high, the returns on the investments were expected to be much higher and that she would be making a lot of money from the CI Holdings' shares. And he requested her to be patient as he knew what he was doing in CI Holdings and expressed his seriousness to retire from the company by the end of 1985 to start his own business. Further, he deposed that around that time he was a frequent traveller. That worried the deceased because she felt that if any misfortune was to happen to him she would be left unsecured. According to him, by reason of the aforesaid factors the deceased became anxious and nervous at the material time and in order to allay her concern and to stop her from asking him about the progress of the sale of Fung Keong each time when he saw her, he issued the PN and told her that if something should happen to him and the Fung Keong deal, she would be financially secured. And above all, he wrote the PN because he was grateful for her support over CI Holdings. Finally, he concluded that the undertaking and the spirit of writing the PN was that the deceased would benefit only if his death preceded hers; it was never meant for her estate.

(2) However, the learned judge was not convinced by the explanation and held that the first defendant failed to rebut the presumption of consideration being given in the PN. His conclusion was premised on the grounds, firstly, the execution of the PN to allay the fears of the deceased was not logical and there was no reasonable justification to warrant its issuance because, as the Fung Keong shares were registered in the names of the deceased or Yoke Ying, even if mishap befell on the first defendant resulting in death, the proceeds

of sale of the shares would still be paid to the deceased and/or Yok Ying. Secondly, in a sort of statement of accounts written by the first defendant (at p 335 rekod rayuan jilid 2, bottom) the following is revealed:

> Secondly in a sort of statement of accounts (the statement of accounts) acknowledged to be written by the first defendant on 16 April 1984 (found in p 10 of encl 63), at the bottom section the following is exposed:

Dec '83	M$15,000	to HK	M$45,566.65
Jan '84	M$15,000		M$20,000.00
Feb '84	M$15,000		----------
March '84	M$15,000		M$65,566.65

	M$60,000		

	M$40,000		

	M$100,000		

> I owe you $34,433.35 to be put back into your account.

[4] The first defendant claimed that the monthly payments listed therein were for spending money he gave to the deceased while waiting for the proceeds from the sale of the Fung Keong shares to come but not monthly payments of interest. The learned judge did not believe him because it was rather odd for a son to issue such a formal and proper record for pocket money given out of love and gratitude to someone so dear as the mother. Further, the dates and the amount paid were closely connected to that stipulated in the PN, that is to say, the first payment (December 1983) commenced just a month after the PN was made and the monthly payment was exactly RM15,000. As such, the learned judge was more inclined to accept that the recordings were connected with the interest payments. Thirdly, the learned judge again referred to the same statement of account at the top section which bears:

> Sale of Fung Keong Rubber Manufactory (M) Sdn Bhd
>
> $34,500,000
> ---------- = $19.1666 per share
> 1,800,000
>
> 178,200 shares x $19.16 = $3,415,500
>
> 99% of $3,415,500 = $3,381,345

To Hong Kong			
$44,420 3/84)	$3,381,345	Elizabeth	$229,845.14
$177,926 3/84)	- 1,419,440	Alice	229,875.00
$177,326 4/84)	----------	Chun	229,875.00
----------)	$1,961,905	Vincent	500,000.00
$399,692)	- 399,672	Lawrance	229,845.14
----------	----------		----------
	$1,562,233		1,419,440.28
	1,348,635		

$625,000	$ 213,598		

[5] The first defendant clarified that the figures show the proceeds received from the sale of the deceased's and/or Yok Ying's shares in Fung Keong. A major portion was given by the deceased to her five children including the first defendant who received RM500,000. The learned judge was not convinced by the clarification because if the reason for the execution of the PN was to comfort the fears of the deceased for being left unsecured in case the death of the first defendant preceded the receipt of the proceeds from the sale of the shares in Fung Keong, why was the PN not cancelled when the full amount for the sale was received? At that point of time, comfort was no longer necessary since the deceased was in possession of a substantial fortune in cash, part of which she could even offer the second defendant a loan and gave another portion of it to the five children. Instead of destroying the PN she retained and secured it in a safe deposit box operated solely by her. The learned judge also dealt with the movements of the Concrete Industries shares belonging to Yok Ying as disclosed by the first defendant in his evidence. The first defendant when he undertook a corporate exercise in 1982 to float CI Holdings as a public listed company he needed RM5m to take up some rights issues in the company. Not having much cash the deceased gave him Yok Ying's shares in Concrete Industries which were subsequently transferred into his own holding company, TFL Holdings Sdn Bhd and pledged for loans to enable him to take up the said share issues. The first defendant claimed that these Yok Ying's shares in Concrete Industries were given to him by the deceased as a gift. However, the learned judge thought otherwise, that is to say, most probably they were to form part of the consideration of the PN. The assumption was based on the facts gathered from the aforesaid letters of 1981 and 1982. The PN was given prior to a period when the first defendant was seeking financial help from the deceased. Loans had been made to the first defendant not only by the deceased but also by a relative, Auntie Lucia who lent RM1m with quite high interest. The first defendant intended to make a killing with the listing of CI Holdings. But before that could materialize, more funds were needed to inject into the company by the shareholders. The deceased was reluctant to invest. So her shares or those controlled by her through Yok

Ying in Concrete Industries were used to pledge as security for bank loans to the first defendant and these shares were transferred to the first defendant's nominated company. The deceased required investment returns as part of her income. The first defendant assured her that he would send her RM2,540 each month and that dividends from Concrete Industries and Fung Keong would be forthcoming. With these, it was unlikely that the deceased would depart with her shares, or those under her control in Concrete Industries without some considerations. Also, the assumption was reinforced by the contents of the PN itself where reference was made to the borrowing 'through Yok Ying Realty Sdn Bhd', which was then the registered owner of the shares. With regard to the assertion by the first defendant that no loan could have been granted to him by the deceased or Yok Ying due to the non-existence of the sum of RM2.9m in any of the bank statements of the deceased and Yok Ying at the material time, the learned judge did not accept the contention by itself as sufficient to rebut the presumption of lack of consideration in the PN. The contention could not be of material significance when firstly, at the time of death the deceased had a considerable amount of money placed in fixed deposit but not in the said current account. Secondly, the receipt of the proceeds from the sales of her Fung Keong shares was not reflected in the said bank statements which indicated that she did not practise the placement of a large amount of her money in a current account. Thirdly, there is/was no necessity to pay into a current account before any sum of money is/was cashed out from a fixed deposit placement because a banker's cheque sent by the drawer of the fixed deposit directly to any nominated payee is/was sufficient to draw out such sums without going through a current account. And fourthly, the consideration for the PN need not be in the form of cash payment, which in this case, the deceased's and/or Yok Ying's shares in Concrete Industries transferred to the first defendant's nominated company could be part of the consideration.

[6] Before us, the learned counsel for the first defendant argued the appeal based on the memorandum of appeal which was categorized under the following heads:

(a) The re-amendment of the statement of claim at the close of the first defendant's case (grounds 18, 19, 20 and 21).

(b) The learned judge's findings went beyond the plaintiff's pleaded case (grounds 22, 23, 24, 25, 26, 27 and 28).

(c) The learned judge was plainly wrong to have ignored the evidence of the independent witness/DW2 (grounds 6,7 and 8).

(d) Misappreciation of the evidence by the learned judge (grounds 1 to 5 and 9 to 17).

[7] (1) Under head (a), the re-amendment is in respect of para 5, which before the re-amendment, reads:

> On or about the 18th day of November 1983, the deceased made a loan of M$2.9m to the first defendant at an agreed interest rate of M$15,000 per month which said loan is acknowledged and evidenced by a promissory note dated 18th November 1983 addressed to the deceased and signed by the first defendant.

And after the re-amendment, it states:

> On or about the 18th day of November 1983*or on diverse occassions*, the deceased made a loan *totalling* M$2.9m to the first defendant at an agreed interest rate of M$15,000 per month, which said loan is acknowledged and evidenced by a promissory note dated 18th November 1983 addressed to the deceased and signed by the first defendant. (Emphasis added.)

The re-amendment was allowed by the court on an oral application made by the learned counsel for the plaintiff at the conclusion of the first defendant's case. It was objected by the learned counsel for the first defendant. The record on the matter is at p 311 in rekod rayuan jilid 1, which shows:

> Lim wished to apply untuk pinda para 5 dalam statement of claim. Lepas perkataan 'November 1983' tambah 'on diverse occasions' and delete the word 'of' in second line and substitute word 'totalling'.
>
> Sebab dari keterangan si mati kemungkinan beri on various occasions.
>
> Plaintif tidak ada keterangan dan bukti sebelum bicara.
>
> Abraham
>
> Ada bantahan. Close of defendant's case.
>
> Clause 5 specially put. Masa boleh put.
>
> Bona fide.
>
> Change character.
>
> Did prejudice defence.
>
> Indefinite period alleged.
>
> Keputusan
>
> Mahkamah benar pindaan. Mahkamah beri peluang kepada defendan untuk mula dan panggil saksi untuk soalan pertama dan balas. Kos dalam kausa.

Thereafter, the proceeding was postponed. At the resumed hearing some five months later, with leave of the court, the plaintiff ('PW1') was recalled for cross-examination on the amendment and the first defendant ('DW1') was also recalled and examined on the documents mentioned in evidence by DW2 which were in the hands of the solicitors for the deceased's estate.

(2) Briefly, the learned counsel submitted that the learned judge erred in the exercise of his discretion when he allowed the plaintiff to re-amend her claim, at the conclusion of the first dfendant's case, to plead that the loan was disbursed on 'diverse occasions' and 'totalling RM2.9m' as opposed to her original plea, (based on the express term of the PN), that the deceased had

'on or about 18 November 1983' made 'a loan' for the sum of RM2.9m. It had the effect of changing her plea. She had every opportunity to do so previously even at the first amendment made on 14 March 1998 but did not do so. The application for the impugned re-amendment was predicated on the sole ground that the evidence led at that juncture suggested that the loan might have been given on various occasions. The plaintiff claimed that she did not have any evidence of the same prior to the trial. That could not be true because she could have discovered that fact from the documents made available/disclosed to her at the discovery stage. The application for the re-amendment was objected strenuously by the first defendant on the following grounds:

(i) it was made at the close of the first defendant's case;

(ii) para 5 as re-amended had been specifically put to the plaintiff ('PN1');

(iii) the application was made at the eleventh-hour, therefore lacked bona fide;

(iv) the proposed re-amendment changed the character of the original claim;

(v) the first defendant was prejudiced, and

(vi) the proposed re-amendment alleged an indefinite period,

(3) The law on amendment of pleadings is already well-settled. The provision relating to amendment of the writ and pleadings is governed by O 20 r 5 of the Rules of the High Court 1980 ('the RHC'). It is trite that amendments can be made at any stage of the proceedings including at the trial. The general principle is that the court will allow such amendments as will cause no injustice to the other parties. It is equally trite that if the application is allowed, the opposite party will normally be compensated by way of costs. Be that as it may, the Federal Court, the apex court of this country, had the occasion to consider and interpret O 20 r 5 of the RHC. It is the case of *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213 where the Federal Court set out three basic questions for consideration, viz:

(1) whether the application was bona fide;

(2) whether the prejudice caused to the other side can be compensated by costs; and

(3) whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character.

(see *Raphael Pura v Insas Bhd & Anor* [2001] 1 MLJ 49 at p 53). It was for the plaintiff who asked the court to exercise a discretionary power in her favour to place some material and advance some cogent reasons to impel the court to lean on her side (see *Multi-Pak Singapore Pte Ltd (in receivership) v Intraco Ltd & Ors* [1992] 2 SLR 793; [1993] 2 SLR 113). As for the general principles for the granting of leave to amend, this was elaborated by adoption in *Hock Hua Bank Bhd v Leong Yew Chin* [1987] 1 MLJ 230 SC at p 232 by Abdul Hamid Ag LP, where he stated and cited:

As for the general principles for the granting of leave to amend:

> 'It is a guiding principle of cardinal importance on the questionof amendment that, generally speaking, all such amendments ought to be made 'for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings' (see per Jenkins LJ in *GL Bakar Ltd v Medway Building & Supplies Ltd* [1958] 1 WLR 1216, p 1231; [1958] 3 All ER 540, p 546).
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> It is a well established principle that the object of the Court is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights ... . Iknow of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace ... It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected if it can be done without injustice, as anything else in the case is a matter of right (per Bowen LJ in *Cropper v Smith* (1883) 26 Ch D 700, pp 710–722, with which observations AL Smith LJ expressed 'emphatic agreement' in *Shoe Machinery Co v Cultam* [1896] 1 Ch 108, p 112).
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> In *Tildesley v Harper* (1876) 10 Ch D 393, pp 396, 397 Bramwell LJ said: 'My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise. *(The Supreme Court Practice* 1985 para 20/5-8/6 p 340)'.

(4) We note that the learned judge did not deal at all in his judgment on the question of re-amendment. Therefore, his judgment is unhelpful on this issue. Be that as it may, to our mind, it does not mean that he did not apply his mind at all to the circumstances raised by the learned counsel for the first defendant in his objection to the application for the re-amendment. The learned judge must have considered them, but only did not put them down in writing otherwise he would not have granted leave to re-amend. Hence, the exercise of his discretion cannot be flawed by reasons of such omission. Now, it is incumbent upon us to apply the law to the facts of the case.

(5) A scrutiny of the contents of the PN reveals that it is a confirmation by the first defendant that he had borrowed from the deceased through Yok Ying the sum of RM2.9m. Though the PN is dated 18 November 1983 and the amount specified, the actual date or dates when the borrowing was transacted, whether the borrowing was transacted on a single or several occasions and whether the borrowing was in the form of cash or kind or both are not definite. A clearer picture of all those matters could only be determined through the evidence adduced at or during the trial of the action, that is to say, a better focus of the borrowing transaction could be obtained from the evidence adduced but not at the preparatory or discovery stage. Hence, to our mind, the averment in the original para 5 of the statement of claim is reasonable and apt under the circumstances. At the time when the

application for the re-amendment was made the evidence had already been settled. The plaintiff, by the purported re-amendment, had not sought to introduce new facts. All that the purported re-amendment sought to do is to throw a brighter light on the spectrum of the same facts relied on in the original statement of claim. In our view, all that the plaintiff was seeking to do was to frame her case so that the trial of the action would lead to a decision of the real matter in controversy. Therefore, we are satisfied that the application for the re-amendment was bona fide. Also, for the same reasons, we are satisfied that the amendment did not in effect turn the suit from one character into a suit of another and inconsistent character. On the question of prejudice, we gather from the evidence, in particular of DW1 and DW2 that all along the preparation of the defence was geared towards rebutting the presumption of consideration intending to establish no such borrowing existed by showing the non-existence of the sum of RM2.9m in any of the deceased's current bank account statements, her fixed deposit slips and Yok Ying's bank statements. In fact, the first defendant was well ahead of the plaintiff in the preparation on this matter. Therefore, it cannot be said that the re-amendment, after the close of the first defendant's case to plead that the loan was disbursed for an indefinite period, had rendered the first defendant's defence grossly inadequate; and also, the first defendant cannot claim that he had been deprived of the opportunity to seek better particulars of the new plea in aid of his defence. Moreover, as evident from the notes of proceedings, after the re-amendment was allowed the learned counsel for the first defendant was given the opportunity to call witnesses to produce the documents mentioned by DW2 which were in the possession of the solicitors for the deceased's estate, but he only opted to recall PW1 for cross-examination and DW1 for examination. As such, we are satisfied that the first defendant was not prejudiced by the re-amendment which could be adequately compensated by an order for costs. Therefore, the learned judge had not erred in law for allowing the re-amendment, except that the order for costs on the re-amendment ought to have been ordered against the plaintiff instead of making the order for costs in the cause.

[8] In respect of head (b), our consideration on this ground is based on our findings and conclusions on the re-amendment as aforesaid. It is trite law that the re-amendment allowed by the learned judge, took effect not on the date in which the application was made or at the date of the order allowing the re-amendment, but at the commencement of the action, as if the re-amendment was made at the time the writ was issued (*Sio Koon Lin & Anor v SB Mehra* [1981] 1 MLJ 225, FC). Hence, our findings and conclusions on the re-amendment generally answer the submission of the learned counsel for the first defendant under this head. However, we have to consider his submissions on two specific points. Firstly, he submitted that the learned judge erred in permitting the plaintiff to proceed with her unpleaded claim that the transfer of the Concrete Industries shares held by the deceased through Yok Ying could have been the consideration for the PN. And what the learned judge overlooked was the first defendant's uncontroverted evidence that the shares given to the first defendant by the deceased were worth less than

RM420,000 at that material time. We scrutinized the judgment. We are satisfied that the learned judge concluded that, most probably the shares were to form part of the consideration of the PN (see at p 56 paras DE rekod rayuan jilid 1). That being the case, the fact that the value of the shares was less than RM2.9m at the material time is irrelevant. Hence, this point failed. Secondly, he submitted that from the totality of the evidence on the original para 5 of the statement of claim led during the trial, the learned judge more or less conceded there was no evidence to support the plaintiff's pleaded claim. And, the learned judge ought to have stopped there and dismissed the plaintiff's claim. The answer to this point partly lies in our findings and conclusions on the re-amendment as aforesaid. The other part lies on the burden of proof that rests on the first defendant. It is his burden to rebut the presumption of consideration on the PN but not for the plaintiff to prove the consideration. And the learned judge had concluded that the first defendant failed to rebut the presumption of want of consideration. Hence, this point holds no water.

[9] With regard to head (c), even though the learned judge, in his judgment, did not specifically mention or discuss the evidence of DW2, we do not think it would be correct to say that he did not consider it at all. To our mind, as the main gist of DW2's evidence was centred on the proof of the non-existence of the sum of RM2.9m in any of the bank statements of the deceased and Yok Ying at the material time for the purpose of proving that no loan could have been granted to the first defendant by the deceased or Yok Ying, such omission by the learned judge is not fatal. The learned judge did not accept that contention by itself as sufficient to rebut the presumption of lack of consideration in the PN. He gave his reasons as aforesaid as to why that contention could not be of material significance. We agree with his reasonings as they are logical and sound.

[10] On head (d), the learned counsel submitted that the learned judge erred in law in making the following findings of fact which went against the weight of evidence:

(i) that there was no reasonable justification to warrant the issue of the PN as a security as the first defendant was only acting as a go-between the purchaser and the then shareholders of Fung Keong (see at pp 50E–51AB rekod rayuan jilid 1);

(ii) that the particulars in the aforesaid statement of accounts showing RM15,000 were probably associated with interest payments (see at pp 51–52 rekod rayuan jilid 1);

(iii) that the first defendant's explanation for the PN as security for the deceased was illogical and improbable because the deceased did not destroy or cancel the PN even after she had received the proceeds from the sale of Fung Keong shares (see at p 53E rekod rayuan jilid 1);

(iv) that the deceased's shares or those controlled by her through Yok Ying in Concrete Industries formed part of the consideration for the PN (see at p 56DE rekod rayuan jilid 1);

(v) that the absence of an entry in the bank statements of the deceased (both here and in Hong Kong) and Yok Ying which recorded the existence of the sum of RM2.9m or anything close to this figure to reflect the consideration of the PN was insufficient to disprove the presumption of consideration for the PN (see at p 57BE rekod rayuan jilid 1); and

(vi) that family members of the deceased had prior knowledge of the loan even before the PN was recovered from the safe deposit box (see at p61C rekod rayuan jilid 1).

[11] The learned counsel asserted that the learned judge erred in law in wholly misappreciating the evidence in either failing to consider at all or sufficiently. On finding (i), it is in evidence, which was not seriously challenged, that the first defendant was instrumental in concluding the sale of Fung Keong shares but not merely as a go-between in the transaction, as stated by the learned judge. And the learned judge cited this as the first reason why he found the first defendant's explanation that the PN was given to allay the deceased's fears lacking in logic. To our mind, the learned judge did say that the first defendant was only acting, to a substantial degree, as a go-between in the transaction. He was justified in saying so because the first defendant did not hold any substantial shares of the deceased and/or Yok Ying on trust in Fung Keong. The difference between the expression 'only acting, to a substantial degree, a go-between' and the expression 'instrumental in concluding the sale' is minimal. They just indicate the degree or extent of involvement of the first defendant in the transaction. Be that as it may, the real or actual ground under the first reason given by the learned judge for not accepting the first defendant's explanation is that there was no reasonable justification to warrant the issue of the PN as a security because, as Fung Keong shares were in the names of the deceased or Yok Ying, even if the first defendant was to meet with an accident and died, the proceeds from the sale of Fung Keong shares would still be paid to the deceased and/or Yok Ying, being the registered owners of the shares. In respect of finding (ii), the learned counsel submitted that the learned judge cited the finding as the second reason why he found the first defendant's explanation illogical. He asserted that the learned judge failed to attach any weight at all to the fact that the monthly payments of RM15,000 ceased after March 1984; and if the recordings of RM15,000 were 'probably' monthly interest payments there was no reason for the payment to cease after March 1984. Further, the learned judge failed (i) to give any weight to the fact that the last recording (March 1984) coincided with the time when the deceased received the proceeds from the sale of Fung Keong shares (March 1984), (ii) to attach any significance to the fact that there were no subsequent demands for the monthly interest from the deceased from April 1984 right up to her death; and (iii) failed to consider the fact that if the PN was evidence of the alleged loan why in the statement of account, reproduced by the learned judge at p 53 rekod rayuan jilid 1, the deceased gave away to the first defendant RM500,000 from the proceeds of the sale of Fung Keong shares, which was the largest amount. We agree with the assertions of the learned counsel. The learned judge came to such finding

merely because it seemed rather odd for a son to give such a formal and proper record for pocket money paid out of love and gratitude to someone so dear as the mother, simply based on the close alignment of the dates and the amount paid to that stipulated in the PN. However, in our view, the alleged failures on the part of the learned judge are related to the issue of interest only. But, the burden is still on the first defendant to prove that no consideration was given for the PN. Although the learned judge cited the issue of interest as the second reason as to why he was not convinced of the first defendant's explanation, we have to consider the other grounds advance by the learned judge on his conclusion that the first defendant failed to rebut the presumption of consideration being given in the PN, before we are entitled to interfere with his overall findings of fact and his ultimate conclusion. With regard to finding (iii), the learned counsel submitted that this finding of fact was cited by the learned judge as the third ground for rejecting the first defendant's explanation. He asserted that only the deceased herself could provide the answer as to why the PN was not destroyed or cancelled. Hence, in the absence of her direct testimony, the learned judge's reasonings were suppositions. Further, the learned judge ought to have viewed the fact of non-destruction or non-cancellation of the PN together with the fact that at the relevant period the deceased gave away the largest portion of the proceeds from the sale of Fung Keong shares to the first defendant. We are of the view that the pertinent fact here is that the PN was not destroyed or cancelled even at the time of her death but not the issue why the PN was not destroyed or cancelled. We must bear in mind that, firstly, nearly some three years prior to her death the deceased was in possession of a substantial fortune in cash resulting from the sale of Fung Keong shares from which she could even offer a loan to the second defendant and gave a substantial amount to each of her children and secondly, RM2.9m, which is a huge amount, was involved in the PN. To our mind, under such circumstances if the PN was really given to the deceased merely to comfort her, as contended by the first defendant, the deceased, for the love of her son, would have destroyed or cancelled the PN long before her death. The deceased's love for the first defendant can be gathered from the evidence including documentary which are the two letters written by the first defendant to her and the statement of account at p 335 rekod rayuan jilid 1 relating to the gift of a substantial sum to each of the children, of which the first defendant got more than double the amount given to the other children. Instead, she kept the PN secured in the safe deposit box until her death together with the PN issued by the second defendant, who backed out from the action after having acknowledged his loan. With hindsight, because no such huge loan was given to him on the PN as contended, the first defendant could have seriously initiated for the destruction or cancellation of the PN with the deceased before her death. He had almost three years to do so but did not do that. For the aforesaid reasons, we accept the reasonings of the learned judge on this issue as reasonable and sound. On finding (iv), we have dealt with the matter in para 7 above. With regard to finding (v), the learned judge gave four reasons why he did accept the first defendant's assertion on the matter, as enumerated in para 4(2) above. Although some of the reasons are based on suppositions and on his own

insight into the matter, in our view, the rest of his reasonings are sound to support his conclusion that the contention alone was not sufficient to disprove the presumption of a lack of consideration in the PN. In respect of finding (vi), the learned judge gave his reason for the finding. He stated that both the plaintiff and the first defendant agreed that Elizabeth was close and affectionate to the deceased; and that being the case, when Elizabeth had knowledge of the loan even before the PN was recovered then in all probabilities the deceased must have confided in Elizabeth of the borrowing. The learned counsel submitted that the learned judge appeared to have accepted the plaintiff's (PW1's) testimony that the family members knew of the loan. He contended that her testimony was in conflict with her evidence where she admitted that Alice Tang did not tell her about the loans and her evidence was also in conflict with her testimony wherein she admitted that Lawrence did not tell her that the first defendant had borrowed RM2.9m from the deceased. Further, he submitted that the contents of the letter from Elizabeth to Messrs Skrine & Co (at p 569 rekod rayuan jilid 2), in particular about the alleged loan of RM2.9m to the first defendant were hearsay as admitted by the writer in the letter itself. He concluded that it could not be said that the letter established that in all probabilities there was in fact consideration for the PN and at the most the letter would only indicate that the deceased might have informed the writer about the existence of the PN. We scrutinized the evidence and found that actually there was no conflict in the evidence of the plaintiff as alleged. She deposed 'Elizabeth told me, Alice knew of this loan' (at p 228 B rekod rayuan jilid 1). The statement is consistent with what she deposed 'Alice did not tell me about these loans. I did not ask her' (at p 222 B rekod rayuan jilid 1), because in the first statement, Elizabeth was the one who told her that Alice knew of the loan. She also admitted that Lawrence did not tell her that the first defendant had borrowed RM2.9m from the deceased. From her testimony, it is manifestly clear that, whether from hearsay or otherwise, that the plaintiff, Elizabeth and Alice knew about the loan before the PN was recovered from the safe deposit box. That being the case, we are of the view that the learned judge was justified in having accepted her testimony that the family knew of the loan. The plaintiff did not say that all members of the family knew of the loan. Even if she had said that, her testimony could still be accepted by the learned judge because the other two members of the family, being the defendants, who had issued the respective PN must have been aware of the respective loan as alleged. No doubt that Elizabeth's letter consisted of hearsay about the alleged loan. To our mind, the learned judge was justified in arriving at the finding because it is for the first defendant to prove that no consideration was given for the PN but not for the plaintiff to prove that consideration was given. Hence, we accept the reasonings of the learned judge on this finding.

[12] Therefore, having regard to the findings of fact and the conclusion of the learned judge based on the totality of the evidence adduced, despite the aforesaid failures on the part of the learned judge, we decline to interfere with his findings of fact and on credibility. Hence, the appeal is dismissed with costs. However, costs for the re-amendment of the statement of claim is to be

paid by the plaintiff to the first defendant. The deposit is to be paid towards taxed costs.

Appeal dismissed.

Reported by Sally Kee Seok Meng